interest when the 2nd defendant exercised her proxy vote as a shareholder at the AGM.

As for the plaintiff's contention that the 2nd defendant's casting vote was biased, Article 52 does provide for such a second vote to be exercised by the Chairman in the event of there being an equality of votes. This had happened at the AGM.

Normally, the second vote follows the first vote and on the facts of this case, there is no way that the 2nd defendant would have voted against the circular resolution. Since the articles of association provide for the exercise of a casting vote, there is no reason to attack that exercise by labelling it as being biased. Bias has no relevancy where casting votes are concerned.

For the reasons that I have given, the plaintiff cannot possibly succeed on the declarations and the other reliefs sought in this suit and to that end, I dismiss this action with costs.

KHA CHAI TIAM

v.

T. S. AUTO & MACHINERY SERVICES

HIGH COURT, SHAH ALAM
DATO' RANITA HUSSEIN JC
[CIVIL SUIT NO. 22-198-90]
23 JUNE 1994

PRACTICE & PROCEDURE: Appeal - Dismissal of O. 14 application - Goods sold and delivered - Cheques dishonoured - Whether any triable issues.

BILLS OF EXCHANGE: Sale of forklifts to defendant - Forklifts delivered and indorsed 'received in good order' - Post-dated cheques given to plaintiff - Cheques dishonoured - Conflicting versions as regards 1st cheque - Rule applicable to bills of exchange - Exceptions - Defendant raising 'fraud' and 'illegality' - Allegation that chassis numbers of forklifts tampered with - Allegation forklifts under ownership of two finance companies - Defence suspicious - Consideration of s. 7, 10(3) of the Road Transport Act 1987 - Section 38 of the Hire Purchase Act 1967.

The plaintiff sold 11 forklifts to the defendant which were delivered on 20 & 22 December 1989 respectively and indorsed as 'received in good order' by the defendant. The defendant paid by way of 4 post-dated cheques of RM44,000 each but all 4 cheques were dishonoured upon presentation. 3 cheques were returned by the bank as the defendant had closed its account but there were two conflicting versions in respect of the 1st cheque. According to the plaintiff, the defendant had replaced the cheque with 2 payments totalling RM44,000 upon being notified of the dishonoured cheque which money was loaned to the defendant on 21 March 1990. The defendant contended that the contract of sale had been cancelled via letter dated 10 November 1989 when it was discovered that the chassis numbers of 7 forklifts were different from that in the registration cards. By that time the defendant had paid the plaintiff RM44,000 as shown by payment slips exhibited in support dated 11 & 13 January 1990 respectively. The plaintiff subsequently repaid the money upon their demand but failed to return the 3 cheques whereupon the defendant closed its bank account. After cancelling the sale the defendant proceeded to repair the forklifts at the request of the plaintiff but the plaintiff refused to pay the costs of the repair and storage charges for which the defendant filed a counterclaim against the plaintiff.

The plaintiff applied for summary judgment pursuant to O. 14 of the Rules of the High Court 1980 (RHC) and in defence the defendant raised the issues of fraud and illegality based on the alleged tampering of the chassis numbers of the 7 forklifts and the fact that the forklifts being under financing, were subject to a claim of ownership by two finance companies.

Held:

[1] On the date of the letter cancelling the sale, the forklifts were not in the defendant's possession. They were only delivered to the defendant on 20 & 22 December 1989. The defendant not only accepted delivery but indorsed 'received in good order' on the consignment notes and also paid the transport charges on 8 January 1989. As for the demand of a refund and the return of the 3 cheques, it is relevant to note that the payment slips showed that the payments were only made on 11 & 13 January 1990 respectively about two months **after** the defendant claimed for its return. To add to the confusion, the defendant averred that the payment of RM44,000 was made by it on 13 January 1990 on the plaintiff's promise to remedy the chassis numbers, thus contradicting its own statement. In the circumstances, the authenticity of the letter of 10 November 1989 became highly questionable. What might remain as a triable issue would be the alleged contravention of s. 38 of the Hire Purchase Act 1967 and the consequences thereof.

[2] In the Court's view, the defendant's version of the transaction was painfully dubious and would in the circumstances attract the principle in *Paclantic Financing Co. Inc. & Ors. v. Moscow Bank Ltd.* [1987] 1 WLR 1063, where Robert Goff LJ stated:

> In all the circumstances, we agree...that the case against the bank (defendant)...should properly be described as shadowy...In our judgment, this is a classic case where leave to defend should be made conditional upon a payment into Court, if not of the entire sum at stake, then at least of a substantial part.

[3] The Court gave the defendant conditional leave to defend, the condition being payment into Court within one week of the sum of RM85,900 which was determined by taking RM176,000, the sum claimed by the plaintiff, less RM90,100 being the proceeds of the preceding auction of the forklifts already deposited into Court.

[Defendant granted conditional leave to defend].

Cases referred to:

Montecchi v. Shinco Ltd. [1980] Lloyds Rep. 50 ***(refd)***

Shangai Hall Ltd. v. Town House Hotel Ltd. [1967] 1 MLJ 223 ***(refd)***

Paclantic Financing Co. Inc. & Ors. v. Moscow Narodny Bank Ltd. [1987] 1 WLR 1063 ***(foll)***

Legislation referred to:

Hire Purchase Act 1967, s. 38

Road Transport Act 1987, ss. 7, 10(3)

For the appellant/defendant - Sivapragasam; M/s. Kalai & Partners

For the respondent/plaintiff - M. Pathmanathan; M/s. Yusuf Lee Pathma & Marbeck

JUDGMENT

Ranita Hussein JC:

The plaintiff had applied for summary judgment under O. 14 against the defendant, claiming the sum of RM176,000 for goods sold and delivered. The application was dismissed by the Registrar on 10 May 1991 and the plaintiff appealed against that decision.

The relevant transaction involved the sale by the plaintiff of 11 forklifts to the defendant at a price of RM16,000 each. The defendant had given the plaintiff four post-dated cheques of RM44,000 each. The forklifts were delivered to the defendant on 20 December 1989 and 22 December 1989. Subsequently, all the four cheques were dishonoured upon presentation.

In respect of three of the cheques, it was not disputed that they were returned by the bank because the defendant had closed its account. As for the first cheque of RM44,000 it lends itself to two conflicting stories:

According to the plaintiff, the first cheque dated 5 November 1989 was presented and dishonoured on 9 January 1990. On being so notified, the defendant replaced the cheque with 2 payments to the plaintiff totalling RM44.000 on 11 January 1990 and 13 January 1990. The plaintiff averred that subsequently on 21 March 1990 he loaned the defendant RM44,000 at the latter's request.

In contrast, the defendant averred that it had cancelled the contract of sale when it discovered that the chassis numbers of 7 of the forklifts were different from the chassis numbers in their registration cards. It had done this via letter dated 10 November 1989. According to the defendant, as at that date it had already paid the plaintiff RM44,000 and payment slips (T6)

were exhibited in support of its contention. The defendant further averred that the plaintiff subsequently repaid the RM44,000 but did not return the remaining three cheques. As such, the defendant closed its account in the bank.

It is, at this stage, relevant to note the dates of the letter cancelling the sale (10 November 1989) and of the payment slips, exhibit T6 (11 January 1990 and 13 January 1990), the significance of which will unravel later on in this judgment.

It was, moreover, averred by the defendant that after cancelling the sale, it proceeded to repair the forklifts at the request of the plaintiff. However, the plaintiff has, to date, refused to pay the cost of the repair plus storage charges, whereupon the defendant filed a counterclaim for such costs against the plaintiff.

Bills of Exchange

The plaintiff's case rests on bills of exchange i.e. the four cheques given to him by the defendant. To put this case in the proper perspective of the settled law on this matter I would refer to the statement of Bridge LJ in the case of *Montecchi v. Shinco Ltd.* [1980] Lloyds Rep. 50 as follows:

> It is elementary that as between the immediate parties to a bill of exchange, which is treated in international commerce as the equivalent of cash, the fact that the defendant may have a counterclaim for unlimited damages arising out of the same transaction forms no sort of defence to an action on the bill of exchange, and no ground on which he should be granted a stay of execution of the judgment in the action for the proceeds of the bill of exchange.

It is thus, clear that the plaintiff could succeed on the bills of exchange themselves unless the circumstances bring them within any of the exceptions to the rule. In this case the defendant has invoked the defences of 'fraud' and 'illegality', both of which are recognised exceptions to the rule on bills of exchange.

The defendant's allegations of fraud and illegality were based on its charge that the chassis numbers of the forklifts had heen tampered with. The defendant further advanced the curious argument that under the Road Transport Act 1987 a person is prohibited from using or possessing a motor vehicle unless it is registered (s. 7) and the forklifts in question cannot be registered since their engine/chassis numbers have been tampered with (s. 10(3)). As such, the consideration was illegal in that it was forbidden by law or would defeat the provisions of any law.

The defendant also submitted that at least seven of the forklifts, being under financing, were under the ownership claim of two finance companies and the plaintiff had no title to pass. In support of its allegation, s. 38 of the Hire Purchase Act 1967, which prohibits the fraudulent disposal of goods comprised in a hire-purchase agreement, was cited.

In the final analysis, the defendant' allegations turn on two premises:

(i) the alleged tampering of the chassis numbers of seven forklifts by the plaintiff:
(ii) the claim to ownership by the finance companies in respect of the forklifts.

As regards the second premise, the plaintiff averred that the understanding between the parties was that when the plaintiff received payment from the defendants on the sale of the forklifts the balance sum owing to the finance companies would be settled and release letters obtained from the companies. The plaintiff further averred that when the defendant failed to make payment, he proceeded to settle the debt on his own and obtained release letters from the finance companies.

As for the first premise, I find that it is balanced on very unsteady ground. According to the defendant, he had, via his letter of 10 November 1989:

(a) notified the plaintiff of the problem in the chassis numbers of the forklifts;
(b) cancelled the sale; and
(c) asked for a refund of its deposit of RM44,000 and the return of its 3 post-dated cheques.

However, as the plaintiff pointed out, on the date of the said letter the forklifts were not in the defendant's possession. They were only delivered to the defendant on 20 December 1989 and 22 December 1989. In fact, the defendant not only accepted delivery on those dates by indorsing 'received in good order' on the consignment notes but also paid the transport charges on 8 January 1990. These acts plainly belied the defendant's claim of having cancelled the sale on 10 November 1989.

As for the demand by the defendant of a refund of its deposit of RM44,000 and the return of its

3 post-dated cheques, it is relevant to not note that the payment slips (exhibit T6) referred to in paragraph 9 of the defendant's affidavit of 25 January 1991, showed that the payments were only made on 11 January 1990 and 13 January 1990, about two months **after** the defendant claimed for its return! To add to the confusion, the defendant averred in paragraph 23 of the same affidavit that the payment of RM44,000. was made by it on 13 January 1990 on the plaintiff's promise to remedy the chassis numbers, thus contradicting its own statement in paragraph 9. In the circumstances, the authenticity of the letter of 10 November 1989 purportedly sent by the defendant becomes highly questionable. What might remain as a triable issue would be the alleged contravention of s. 38 of the Hire Purchase Act 1967 and the consequences thereof.

In proceeding with this case I found guidance from the Federal Court in the case of *Shanghai Hall Ltd. v. Town House Hotel Ltd.* [1967] 1 MLJ 223, where it was held that:

> the learned trial Judge after holding that there was one triable issue should have gone further and considered whether the appellant's defence was in bad faith or whether there were suspicious circumstances in the mode of presenting it or that the defence was a sham.

In my view, the defendant's version of the transaction is painfully dubious and would, in the circumstances attract the principle in *Paclantic Financing Co. Inc. & Ors. v. Moscow Narodny Bank Ltd.* [1987] 1 WLR 1063, where Robert Goff LJ stated as follows:

> In all the circumstances, we agree ... that the case against the bank (defendant) ... should properly be described as shadowy ... In our Judgment, this is a classic case where leave to defend should be made conditional upon a payment into Court, if not of the entire sum at stake, then at least of a substantial part.

For the reasons stated above, I gave the defendant conditional leave to defend, the condition being payment into Court within one week of the sum of RM85,900. The amount was determined by taking RM176,000 being the sum claimed by the plaintiff, less RM90,100 being the proceeds of the preceding auction of the forklifts already deposited into Court.

KHENG HOE (MALAYA) SDN. BHD.

v.

DIRECTOR-GENERAL OF INLAND REVENUE

HIGH COURT, KUALA LUMPUR
DATUK HARUN BIN MAHMUD HASHIM J.
[TAX APPEAL NO: A1 OF 1984]
16 MAY 1994

REVENUE LAW: Appeal by way of case stated from the Special Commissioners of Income Tax - Whether payments made by appellant to its executives are commissions which are deductible under s. 33 of Income Tax Act 1967 - Whether such payments are in fact bonuses which are not deductible over and above the limits stipulated under s. 39(1)(h) of the Income Tax Act.

Additional assessment was imposed on the appellant for the years of assessment 1975 to 1981 based upon the amendment to the Income Tax Act 1967 (the Act) by the addition of sub-section 39(1)(h) which restricted tax deduction for bonus paid to RM1,000 or two-twelfths of salary, whichever is greater.

The appellant stated that the payments on which additional assessment was imposed were commissions paid to its executives and contended that as s. 39(1)(h) of the Act applies to the payment of bonus and not commission, the payments made did not fall under the said section. The Special Commissioners of Income Tax found in favour of the Revenue and the appellant appealed further.

Held:

[1] In a taxing statute, the question always is what is the real character of the payment, not what the parties call it. The issue whether commissions paid to employees as incentive payments from profits is bonus in the context of s. 33 of the Act read with s. 39(1)(h) of the Act has been considered by the Supreme Court in *Director-General of Inland Revenue v. Highlands Malaya Plantations Ltd.* which held that the payment may be gratuitous as in the case of the non-managerial staff or it may be payment which the managerial staff are entitled to as "incentive" but nevertheless it is still a "bonus".

[2] As it was clear from the resolutions of the Board of Directors of the appellant that the payments were to be incentive payments from